MAJLIS PERBANDARAN KUANTAN v. KINING EXETON SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LIM CHONG FONG J
[ORIGINATING SUMMONS NO: WA-24C-24-01-2020]
11 MARCH 2021

CONSTRUCTION LAW: *Adjudication – Adjudication decision – Setting aside – Application for – Parties entered into contract before Construction Industry Payment and Adjudication Act 2012 ('CIPAA') came into force – Whether fell within ambit of CIPAA – Whether adjudication decisions null and void – Whether decisions applied retrospectively or prospectively – Whether retrospectivity applied without limitation – Whether there were pending court challenges in respect of adjudication decisions – Whether retrospectivity effect affected adjudication decisions*

This was an application to set aside adjudication decisions made under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') as well as High Court enforcement orders made pursuant thereto. By a contract made in writing ('contract'), the plaintiff appointed the defendant as the main contractor to construct and complete a project ('project'). There were disputes and differences which arose between the parties pursuant to the contract and the defendant commenced two separate adjudication proceedings respectively against the plaintiff. The plaintiff failed, refused or neglected to pay the defendant on both the adjudication decisions. Consequently, the defendant commenced originating summons to enforce the adjudication decisions pursuant to s. 28 of the CIPAA, which was allowed by the High Court. As a result, the plaintiff paid the defendant the sum of RM8,228,744.41 in full and final settlement of both adjudication decisions. By reason of the Federal Court cases of *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals* which held that the CIPAA applied prospectively, the plaintiff therefore instituted this originating summons ('application') to apply to set aside both the aforementioned adjudication decisions. The plaintiff prayed, *inter alia*, for the adjudication decisions and all subsequent orders enforcing the same to be set aside and/or declared a nullity and for all monies previously paid by the plaintiff to the defendant pursuant to the said adjudication decisions be refunded. The plaintiff contended that the contract between the parties was made on 8 August 2011 and hence did not fall within the ambit of the CIPAA and accordingly, the adjudication decisions obtained in favour of the defendant were null and void.

Held (disallowing application):

(1) In the absence of any pronouncement of prospective overruling by the Federal Court, it was presumed that the decision was retroactive unbounded by time. There was a consensus here between the parties that

the Federal Court in *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* did not pronounce that the decisions applied prospectively only. As to the proposition that the retrospectivity applied without limitation, it was necessary to determine whether the seminal opinion of Justice Abdul Malek Ahmad made in *PP v. Mohd Radzi Abu Bakar* was made *en passant*; hence, *obiter*. (paras 27 & 28)

(2) The pertinent question here was whether the following emphasised limitation to retrospectivity/retroactivity: 'To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level' as opined by Justice Abdul Malek Ahmad *ratio decidendi* or *obiter dicta*? The distinction between *ratio decidendi* and *obiter dicta* is fact sensitive depending on the circumstances of the case. It would be *ratio decidendi* if it concerns the fact in issue and hence necessary to dispose the case. It would otherwise be *obiter dicta* if made in passing without mature argument or is merely advisory in nature. (paras 32 & 33)

(3) This court was not convinced that the opinion of Justice Abdul Malek Ahmad had been made *en passant*. It was concurred by Chief Justice Ahmad Fairuz in the *Mohd Radzi* case. Furthermore, the same opinion was concurred by Justices Siti Norma and Pajan Singh Gill in the case of *PP v. Tan Tatt Eek & Other Appeals*. There must have been deliberations done. Therefore, the apex court had consciously introduced the limitation to develop the Malaysian jurisprudence on retrospectivity differently from the English jurisprudence as adopted in *PP v. Dato' Yap Peng*. In the premises, this court was not so bold and confident to hold that the opinion of Justice Abdul Malek Ahmad was *obiter* because it was definitely not plainly and obviously so. (paras 41 & 42)

(4) Nonetheless, based on *stare decisis*, this court was also bound by the Court of Appeal case of *Hamzah Mat Sah v. Ambank (M) Berhad* which had faithfully followed and applied Justice Abdul Malek Ahmad's opinion. Accordingly, there was no cogent reason for this court not to follow its earlier decision of *Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd & Another Case* which followed *Hamzah Mat Sah v. Ambank (M) Berhad* as relied upon by the defendant. (paras 42 & 43)

(5) The defendant's enforcement applications of the adjudication decisions were therefore allowed by the court without further appeal by the plaintiff. In fact, the plaintiff thereafter paid the defendant accordingly

based on the adjudication decisions. There was, in other words, no pending court challenge in respect of the adjudication decisions. Consequently, the retrospectivity effect of the cases of *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (*supra*) and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*) neither applied nor affected the adjudication decisions here. (para 44)

Case(s) referred to:

Adri Anton Kalangie v. Public Prosecutor [2018] 2 SLR 557 ***(refd)***
Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***
Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***
Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors [2010] 1 CLJ 300 FC ***(refd)***
Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***
Hamzah Mat Sah v. AmBank (M) Bhd [2017] 1 LNS 158 CA ***(foll)***
Hasibullah Mohd Ghazali v. PP [1993] 4 CLJ 535 SC ***(refd)***
Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other Appeals [2020] 1 CLJ 193 FC ***(refd)***
Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal [2020] 1 CLJ 299 FC ***(refd)***
Karuppannan Chellapan v. Balakrishnen Subban [1994] 4 CLJ 479 FC ***(refd)***
Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd & Another Case [2020] 1 LNS 1852 HC ***(foll)***
Linkletter v. Walker (1965) 381 US 618 ***(refd)***
Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***
Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd (02(f)-38 & 39-05-2018) (Unreported) ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munawar Ahmad Anees v. PP [2010] 1 CLJ 802 FC ***(refd)***
Ng Kong Ling & Anor v. Low Peck Lim & Ors [2017] 5 CLJ 651 FC ***(refd)***
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***
Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan [2020] 1 CLJ 595 FC ***(refd)***
PP v. Dato' Yap Peng [1987] 1 CLJ 550; [1987] CLJ (Rep) 284 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
Re Spectrum Plus [2005] UKHL 41 ***(refd)***
Sarwan Kumar v. Madan Lal Aggarwal [2003] AIR 1475 SC ***(refd)***

Legislation referred to:

Construction Industry Payment and Adjudication Act 2012, s. 28

For the plaintiff - Bastian Pius Vendargon & Gene Anand Vendargon; M/s Bastian Vendargon
For the defendant - Cecil Abraham, Aniz Ahmad Amirudin & Syukran Syafiq; M/s Cecil Abraham & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

Lim Chong Fong J:

Introduction

[1] This is an application to set aside adjudication decisions made under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") as well as High Court enforcement orders made pursuant thereto.

[2] The plaintiff is a local authority constituted pursuant to the Local Government Act 1976.

[3] The defendant is a private limited company involved in the construction business.

Background

[4] By a contract made in writing (Contract No. MPK/J/A/W/T: 03/2010 of 2011) dated 8 August 2011 ("contract"), the plaintiff appointed the defendant as the main contractor to construct and complete the project described as "Cadangan Membina Kompleks Ibu Pejabat Majlis Perbandaran Kuantan (MPK) Di Atas Lot 29, Seksyen 30, Jalan Tanah Putih di Kuantan, Pahang Darul Makmur." ("project").

[5] There were disputes and differences which arose between the parties pursuant to the contract and the defendant commenced two separate adjudication proceedings namely adjudication proceedings reference no. KLRCA/D/ADJ-0173-2015 and KLRCA-D-ADJ-0341-2016 respectively against the plaintiff.

[6] The defendant succeeded in both adjudication proceedings and obtained adjudication decisions dated 23 March 2016 and 24 November 2016 respectively against the plaintiff.

[7] The plaintiff failed, refused or neglected to pay the defendant on both the adjudication decisions.

[8] Consequently, the defendant commenced KLHC Originating Summons No. WA-24C-173-12/2016 and WA-24C-174-12/2016 to enforce the adjudication decisions pursuant to s. 28 of the CIPAA respectively. The High Court allowed both enforcement applications on 18 July 2017.

[9] As the result, the plaintiff on 26 April 2018 paid the defendant the sum of RM8,228,744.41 in full and final settlement of both the adjudication decisions which was duly acknowledged by the defendant's solicitor's letter dated 26 October 2018.

Preliminary

[10] By reason of the Federal Court cases of *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd & Another Appeal* [2020] 1 CLJ 299 and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd & Other*

Appeals [2020] 1 CLJ 193 which on 16 October 2019 held that the CIPAA applied prospectively, the plaintiff therefore on 29 January 2020 instituted this originating summons ("application") to apply to set aside both the aforementioned adjudication decisions.

[11] The plaintiff prayed for the following in the application:

(i) the adjudication decision dated 23 March 2016 in respect of Adjudication Proceedings Reference No: KLRCA/D/ADJ-0173-2015 and the adjudication decision dated 24 November 2016 in respect of Adjudication Proceedings Reference No: KLRCA/D/ADJ-0341-2016 both issued by the adjudicator, Daniel Tan Chun Hao, as well as all subsequent orders enforcing the same, be forthwith set aside and/or declared a nullity;

(ii) consequentially, all monies previously paid by the plaintiff to the defendant pursuant to the said adjudication decisions be refunded within seven days from the date of the order together with appropriate interest from the date of payment (26 April 2018) till return;

(iii) costs of the OS be paid by the defendant to the plaintiff; and

(iv) such further and/or other relief as this Honourable Court deems just and appropriate.

[12] The affidavits which were filed for purposes of the application are as follows:

(i) plaintiff's affidavit in support affirmed by Hajah Aliza binti Yahaya dated 24 January 2020;

(ii) defendant's affidavit in reply affirmed by Nik Jailani bin Nik Jid dated 20 February 2020; and

(iii) plaintiff's affidavit in reply affirmed by Hajah Aliza binti Yahaya 4 March 2020.

[13] The application was fixed before me for hearing on 11 January 2021. After having read the written submissions filed by the parties and hearing oral arguments of counsel, I adjourned my decision to deliberate on the arguments advanced by them.

[14] Now having done so, I furnish my decision below together with the supporting grounds.

Contentions And Findings

[15] Dato' Bastian Vendargon of counsel for the plaintiff contended that the contract between the parties was made on 8 August 2011 and hence does not fall within the ambit of the CIPAA. Accordingly, the abovementioned adjudication decisions obtained in favour of the defendant are null and void and must be set aside. It follows that all subsequent orders of court enforcing

the adjudication decisions are also null and void and must be set aside following the Federal Court case of *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLRA 183. Consequently, this application as sought must be allowed to restitute the monies paid by the plaintiff to the defendant pursuant thereto.

[16] According to Dato' Vendargon, it is necessary to determine whether the decisions in *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (*supra*) and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*) resulted in prospective or retrospective overruling. Although the court held in both cases that the CIPAA operates prospectively, the court was however silent on whether the decisions have prospective or retrospective overruling effect.

[17] In so determining, he stressed that all decisions of overruling apply retrospectively by application of the declaratory theory of law, *viz* the courts do not make law but declare what the law has always been unbounded by time. There are exceptions where the courts declare that that decision is to apply prospectively on public policy consideration in criminal and constitutional law cases generally. The advent of prospective overruling originated from the United States of America Supreme Court case of *Linkletter v. Walker* (1965) 381 US 618 wherein the accepted rule is that the courts may in the interest of justice declare its decision to be prospective only.

[18] Dato' Vendargon then pointed out that in the Federal Court case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 2 MLRA 590, Abdul Malek Ahmad FCJ (later PCA) held as follows:

> [6] This issue had actually been made clear by the Supreme Court in *Public Prosecutor v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 when it said:
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> > The general principle of retroactivity of a judicial declaration of invalidity of a law was overturned by the Supreme Court of the United States of America in *Linkletter v. Walker* [1965] 381 US 618 (at page 628) when it devised the doctrine of prospective overruling in the constitutional sphere in 1965 as a practical solution for alleviating the inconveniences which would result from its decision declaring a law to be unconstitutional, after overruling its previous decision upholding its constitutionality. This doctrine was applied by the Supreme Court of India in *LC Golak Nath v. State of Punjab & Another AIR* [1967] SC 1643 (at pages 1666-1669). The doctrine – to the effect that when a statute is held to be unconstitutional, after overruling a long-standing current of decisions to the contrary, the court will not give retrospective effect to the declaration of unconstitutionality so as to set aside proceedings of convictions or acquittals which had taken place under that statute prior to the date of the judgment which declared it to be unconstitutional, and convictions or acquittals secured as a result

of the application of the impugned statute previously will accordingly not be disturbed – can be applied by the Supreme Court as the highest court of the country in a matter arising under the Constitution to give such retroactive effect to its decision as it thinks fit to be moulded in accordance with the justice of the cause or matter before it – to be adhibited however with circumspection and as an exceptional measure in the light of the circumstances under consideration.

In England this doctrine has been recognised by the House of Lords by necessary implication in the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 issued by Lord Gardiner LC on behalf of himself and the Lords of Appeal in Ordinary on July 26, 1996. More recently, in *Jones v. Secretary of State for Social Services* [1972] AC 944, two judges of the House of Lords, Lord Diplock (at page 1015) and Lord Simon of Glaisdale (at page 1026) were prepared to consider the application of the American doctrine of prospective overruling to England. In *Choice Investments Ltd v. Jeromnimon* [1981] 2 WLR 80 Lord Denning MR in his judgment in the English Court of Appeal (at page 84) accepted the subsistence and application of the doctrine. In *Defrenne v. Sabena* [1981] 1 All ER 122, the Court of Justice of the European Communities applied the doctrine of prospective overruling predicated on conditions of legal certainty which required the court, as an exceptional measure, to declare the law for the future only.

At the conclusion of argument on March 19, 1987, the court accordingly by a majority (Tun Mohamed Salleh Abas LP, and Tan Sri Hashim Yeop A. Sani SCJ dissenting) declared section 418A to be unconstitutional and void as being an infringement of the provisions of article 121(1) and applied the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of our judgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.

[7] *The principle enunciated in Public Prosecutor v. Dato' Yap Peng (supra) seems to indicate that, unless there is a prospective ruling, any decision will also affect all cases disposed of before that decision. To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level.*

(emphasis added)

[19] Nonetheless he submitted, with the greatest of respect, that Justice Abdul Malek Ahmad made the aforequoted emphasised opinion unsupported by authority *en passant*; hence *obiter*. According to him, the statement was unnecessary to decide the case before the court on the application of the rule against double presumption in the then Dangerous Drugs Act 1952 which

was pending at the appellate stage on the basis of the Federal Court case of *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1997] 2 MLRA 311 that did not order prospective overruling.

[20] According to him, the correct proposition of the law has been set out as follows by Gopal Sri Ram JCA (later FCJ) also in *PP v. Mohd Radzi Abu Bakar* (*supra*):

> [26] Very recently, the House of Lords has had to consider the doctrine of prospective overruling in *National Westminster Bank Plc v. Spectrum Plus Limited* [2005] UKHL 41. The House was agreed that it had the power to overrule prospectively. Lord Nicholls of Birkenhead explained the operation of prospective overruling in terms which are relevant to the instant appeal. He said:
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> > A court ruling which changes the law from what it was previously thought to be operated retrospectively as well as prospectively. The ruling will have a retrospective effect so far as the parties to the particular dispute are concerned, as occurred with the manufacturer of the ginger beer in *Donoghue v. Stevenson* [1932] AC 562. When Mr Stevenson manufactured and bottled and sold his ginger beer the law on manufacturers' liability as generally understood may have been as stated by the majority of the Second Division of the Court of Session and the minority of their Lordships in that case. But in the claim Ms Donoghue brought against Mr Stevenson his legal obligations fell to be decided in accordance with Lord Atkin's famous statements. Further, because of the doctrine of precedent the same would be true of everyone else whose case thereafter came before a court. Their rights and obligations would be decided according to the law as enunciated by the majority of the House of Lords in that case even though the relevant events occurred before that decision was given.
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> > People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences. 'Prospective overruling', sometimes described as 'non-retroactive overruling', is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions.
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> > Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusively prospective effect. The ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date continue to be governed by the law as it was conceived to be before the court gave its ruling.

> Other forms of prospective overruling are more limited and 'selective' in their departure from the normal effect of court decisions. The ruling in its operation may be prospective and, additionally, retrospective in its effect as between the parties to the case in which the ruling is given. Or the ruling may be prospective and, additionally, retrospective as between the parties in the case in which the ruling was given and also as between the parties in any other cases already pending before the courts. There are other variations on the same theme.
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> [27] *So too here. When the learned judge at first instance tried the respondent and handed down his decision, Muhammed bin Hassan was yet to be decided. However, the judgment of this court in Muhammed bin Hassan had been handed down before the respondent' s appeal against his conviction was heard by the Court of Appeal. It then became necessary for the Court of Appeal, in accordance with the principles adverted to by Lord Nicholls in Spectrum Plus, to apply Muhammed bin Hassan to this case. It is in this way that the declaration of the common law by a superior court operates retrospectively*. (emphasis added)

[21] For completeness, I noted that Ahmad Fairuz CJ held as follows:

> [2] *Mengenai isu penguatkuasaan kebelakangan keputusan kes Muhammed bin Hassan v Public Prosecutor [1998] 2 CLJ 170; [1998] 2 MLJ 273 saya setuju bahawa keputusan itu hanya terpakai kepada kes-kes yang masih menanti perbicaraan, tidak kira samada dibicara bagi kali pertamanya atau dibicara di peringkat rayuan.* Ketara dari deraf penghakiman YA Dato' Gopal Sri Ram, penghakiman kes *Muhammed bin Hassan v. Public Prosecutor supra* telah dibuat sebelum rayuan responden dibicarakan oleh Mahkamah Rayuan. Justeru itu penghakiman *Muhammed bin Hassan supra* wajar sekali digunapakai oleh Mahkamah Rayuan itu. (emphasis added)

[22] Dato' Vendargon noted that Justice Abdul Malek Ahmad again repeated his same *obiter en passant* opinion in the Federal Court case of *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 1 MLRA 58 which was adopted by the Court of Appeal in *Hamzah Mat Sah v. Ambank (M) Bhd* [2017] 1 LNS 158; [2018] 3 MLRA 445.

[23] In the premises, he submitted that it is erroneous in principle to apply limitations of prospective overruling to cases such as *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (*supra*) and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*) where there was simply no prospective overruling pronounced in those cases. He emphasised that in the Singapore Court of Appeal case of *Adri Anton Kalangie v. Public Prosecutor* [2018] 2 SLR 557, Sundaresh Menon CJ simplified the principles of retrospective or prospective overruling as follows:

> 27. Traditionally, a judgment pronouncing on a legal issue is taken to be unbounded by time and to have both retroactive and prospective effect ... This accords with the declaratory theory of law, which posits that judges do not create law but rather declare what the law has been and continue to be ...

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> 39. First we reiterate that it is only in exceptional circumstances that the court may exercise its discretion to invoke the doctrine of prospective overruling... Such exceptionality is likely to be even more prominent in the context of civil cases, where this court has observed that "in contrast to
B criminal cases, civil cases presenting exceptional circumstances that justify invoking the doctrine of prospective overruling are likely to be few and far between ...
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> ...
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> 43. ... judicial pronouncements are by default retroactive in nature. Thus,
C as a general rule, until and unless the appropriate appellate court explicitly states that a judicial pronouncement is to take effect only prospectively, that pronouncement should presumptively be taken as being unbounded by time.

He also alluded to the English House of Lords case of *Re Spectrum Plus* [2005]
D UKHL 41 and the Indian Supreme Court case of *Sarwan Kumar v. Madan Lal Aggarwal* [2003] AIR 1475 SC that carry similar principles.

[24] In opposition, Tan Sri Cecil Abraham of counsel for the defendant counter contended that this application is in nature and substance no different from that which recently arose in *Kasugi Prima Sdn Bhd v. Cobrain Holdings*
E *Sdn Bhd & Another Case* [2020] 1 LNS 1852; [2021] 1 AMR 805 wherein the applications were refused. According to him, the approach taken in the *Kasugi Prima* case ought to be maintained and applied herein.

[25] I have decided as follows in the *Kasugi Prima* case with emphasis added:

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> [35] Nevertheless, the defendant further submitted that the rulings in *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*) and *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd (and Another Appeal)* (*supra*) do not apply to the stay orders and adjudication decisions in issue here.

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> [36] In the Court of Appeal case of *Hamzah bin Mat Sah v. Ambank (M) Berhad* (*supra*), Abang Iskandar Abang Hashim JCA (now CJSS) held as follows:
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> > [19] A more recent pronouncement on the effect a new law can be seen in the judgment of Lord Nicholls of Birkenhead, in the
> H English House of Lords decision in the case of *National Westminster Bank Plc v. Spectrum Plus Limited* [2005] UKHL 41, where the learned Law Lord had said:
> >
> > > A court ruling which changes the law from what it was previously thought to be operated retrospectively as well as
> > I prospectively. The ruling will have a retrospective effect so far as the parties to the particular disputes are concerned.
> > >
> > > ...

People generally conduct their affairs on the basis of what they understand the law to be. This 'retrospective' effect of a change in the law of this nature can have disruptive and seemingly unfair consequences.

Prospective overruling takes several different forms. In its simplest form prospective overruling involves a court giving a ruling of the character sought by the bank in the present case. Overruling of this simple or 'pure' type has the effect that the court ruling has an exclusive prospective effect. This ruling applies only to transactions or happenings occurring after the date of the court decision. All transactions entered into, or events occurring, before that date, continue to be governed by the law as it was conceived to be before the court gave its ruling.

[20] Back to our own shores, in 2006 the Federal Court had, in the case of Pendakwa Raya v. Mohd Radzi bin Abu Bakar [2005] 6 AMR 203; [2006] 1 CLJ 457 through the speech of learned Justice Abdul Malek Ahmad FCJ [as he then was], ruled as follows:

To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level.

[21] So, the position is clear. A new law is, ipso facto prospective in effect, unless it is expressly stated to have a retrospective effect. But, in the absence of such express stipulation as to its overarching retrospective effect, then the extent of its retrospectivity can be seen in the words of learned Justice Abdul Malek FCJ [as he then was] in the Mohd Radzi Abu Bakar case [supra] namely, its applicability is limited to pending cases, either at first instance or at the appellate stage [see also the case of Pendakwa Raya v. Tan Tatt Eek (And 3 Other Appeals) [2005] 2 AMR 353; [2005] 2 MLJ 685; [2005] 1 CLJ 713].

[37] The stay orders were entered into and perfected by the parties by consent. These stay orders are obviously final because they are not appealed upon further by the parties. By the time the retrospectivity rulings in Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd (supra) and Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd (And Another Appeal) (supra) are pronounced, the stay orders have also been performed. In other words, there is no pending challenge against the stay orders whether at first instance or at any appellate stage.

[38] As the result, I find and hold following Hamzah Mat Sah v. Ambank (M) Berhad (supra) that the rulings in Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd (supra) and Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd (And Another Appeal) (supra) have no retroactive effect upon the stay orders. In consequence, the adjudication decisions ought not to be disturbed too. (emphasis added)

[26] My scrutiny of Dato' Vendargon's submissions discloses firstly that since there is no express prospective overruling made in *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (*supra*) and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*), it must be presumed that these cases applied retrospectively. Secondly, the retrospectivity has no limitation. I will deal with his submissions *seriatim*.

[27] I am satisfied and accept his first proposition that in the absence of any pronouncement of prospective overruling by the Federal Court, it is presumed that the decision is retroactive unbounded by time. There is consensus here between the parties that the Federal Court in *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (*supra*) and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*) did not pronounce that the decisions applied prospectively only. In fact, this has been clarified recently in the brief grounds of the Federal Court cases of *Milsonland Development Sdn Bhd v. Macro Resources Sdn Bhd* (02(f)-38 & 39-05-2018) as follows:

> This appeal concern the decision of this court in *Bauer* where it was held that CIPAA operates prospectively. The question is whether the decision in *Bauer* is to be construed (*sic*) as being retrospective or prospective. In our view, it is explained from the judgment that it is to be applied retrospectively in accordance with the settled principle of law because there was no pronouncement of prospective ruling. On that basis, we decline to make consequential orders that the decision in *Bauer* is to be applied prospectively as invited. In that circumstances, we allow the appeal with costs of RM40,000.00 to appellant subject to allocatur fee. The decision of Adjudicator and the courts below is set aside.

[28] As to the second proposition that the retrospectivity applied without limitation, it is necessary to determine whether the seminal opinion of Justice Abdul Malek Ahmad FCJ made in *PP v. Mohd Radzi Abu Bakar* (*supra*) was made *en passant*; hence *obiter*.

[29] Although the principle of *ratio decidendi* and *obiter dicta* are elementary concepts learnt in first year law school curriculum, the distillation as to which it is in any particular case may not be an easy feat.

[30] In *Stroud's Judicial Dictionary of Words and Phrases* (7th edn), *obiter dicta* has been defined as follows:

> *Obiter dicta* are what the words literally signify, namely, statement by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case, and the reasons for the decision (*Flower v. Ebbw vale Steel, Iron & Coal Co* [1934] 2 K.B. 132, 154)

[31] In the Supreme Court case of *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, Hashim Yeop Sani SCJ (later CJ (Malaya)) held as follows:

> A precedent is "in point" if there was raised, argued and decided in it in relation to one set of facts some issue of law which is the same as has arisen now before the Court. In as much as it is the function of the Court deciding in a later case to ascertain what the *ratio* of a precedent is, it must also decide what is mere *obiter dicta* or *judicial dicta* i.e., not part of a *ratio* but relevant only to a collateral matter.

Subsequently in the Supreme Court case of *Hasibullah Mohd Ghazali v. PP* [1993] 4 CLJ 535, Edgar Joseph Jr SCJ held as follows:

> Having regard to the conclusion at which we had arrived on the admissibility of the alleged confession by the appellant, and its effect on the case for the prosecution, it is unnecessary for us to decide these other questions. Moreover, were we to do so, our decision would be *obiter dicta*.

Thus in the Federal Court case of *Karuppannan Chellapan v. Balakrishnen Subban* [1994] 4 CLJ 479, the following advisory *dicta* of Hj Lamin Mohd Yunus FCJ (later PCA) has been reported as *obiter*:

> To avoid potential litigation with such a vendor, a buyer should, in an even better way, also make searches at other government offices or local authorities for anything that concerns the land in an adverse way, such as the conditions in question imposed on the landowner or rather the predecessor in title of the appellant. The buyer, instead of making a search in the local authorities etc., can also make written requisitions to the vendor for similar information which is adverse to the land as conveyancing solicitors in England are accustomed to do.

Likewise in the subsequent Federal Court case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345, Edgar Joseph Jr FCJ held as follows:

> Unfortunately, Lord Denning MR, who delivered the main judgment, in rejecting the defence of the main contractor after deciding the question of construction of clause 13 of the subcontract in favour of the sub-contractor went on to make some general observations, which were in no way essential to the decision in the case, and were therefore *obiter dicta*, in the following terms ...

In another later Federal Court case of *Darma Suria Risman Saleh v. Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 CLJ 300, Gopal Sri Ram FCJ held as follows:

> ... It is a comment made in passing and without the benefit of mature argument. It is therefore pure *obiter dicta* and lacks even persuasive authority ...

Thereafter in the Federal Court case of *Ng Kong Ling & Anor v. Low Peck Lim & Ors* [2017] 5 CLJ 651, Md Raus Sharif PCA (later CJ) held as follows:

> [42] Since it was the first respondent who had raised the trust issue as his defence in the Sessions Court action, the rejection of the defence must necessarily be a part of the *ratio decidendi* of the case and not an *obiter dicta* as held by the Court of Appeal. This is particularly so, when many days were spent hearing the issue relating to the alleged trust ...

In another later Federal Court case of *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v. Mohd Sobri Che Hassan* [2020] 1 CLJ 595, Alizatul Khair Osman FCJ held as follows:

> [102] ... In any event, we are of the view that what Justice Peh Swee Chin's observations were purely *obiter* based on the factual matrix of the case.

Finally and very recently in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579, Abdul Rahman Sebli FCJ held as follows:

> [72] It is a principle of great antiquity that the decision in each case must be confined to its own peculiar facts and circumstances. It is not every pronouncement by the court that counts as the *ratio decidendi* of the case. While *obiter dicta* are entitled to due respect, they cannot be placed on par with *ratio decidendi*. Care must be taken to separate the wheat from the chaff so to speak.

[32] In my view, it can therefore be discerned that the distinction between *ratio decidendi* and *obiter dicta* is fact sensitive depending on the circumstances of the case. It would be *ratio decidendi* if it concerns the fact in issue and hence necessary to dispose the case. It would otherwise be *obiter dicta* if made in passing without mature argument or is merely advisory in nature.

[33] The pertinent question here is whether the following emphasized limitation to retrospectivity/retroactivity: "To my mind, the correct proposition would be that any decision made, without the necessity of a prospective ruling, can apply only to pending cases irrespective of whether at first instance or at the appellate stage. It certainly does not apply to cases already disposed of at the highest appellate level." as opined by Justice Abdul Malek Ahmad *ratio decidendi* or *obiter dicta*? This same opinion was reiterated by His Lordship *verbatim* in *PP v. Tan Tatt Eek & Other Appeals* (*supra*).

[34] It is plain from the facts of both cases of *PP v. Mohd Radzi Abu Bakar* (*supra*) and *PP v. Tan Tatt Eek & Other Appeals* (*supra*) that they concerned the retrospectivity which resulted from the interpretation of the double presumption provisions in the Dangerous Drugs Act 1952 by the earlier Federal Court in the case of *Muhammed Hassan v. PP* (*supra*) since no prospective overruling was pronounced therein. Consequently, both the

cases had to deal with the effect of the retrospectivity. I noticed that in *PP v. Tan Tatt Eek & Other Appeals* (*supra*), Siti Norma Yaakob FCJ (later CJ (Malaya)) further held as follows:

> Finally I come to the closing submission as to whether the ruling against double presumptions has retrospective effect on cases decided before *Muhammed bin Hassan*. This is so as the conviction for trafficking against Abdul Rahim was recorded on 23 September 1997, before *Muhammed bin Hassan*, although the Court of Appeal's decision substituting the conviction adopted the rule against double presumptions as the appeal was heard after *Muhammed bin Hassan*.
>
> *The time honoured principle of law as regards judicial precedent and the need to adhere to the latest decisions of the highest court in the land, is the basis on which certainty in the law is achieved and upon which individuals can rely to conduct their affairs. It is with these guidelines or principles in mind that rulings from this court, particularly when it decides to resolve conflicts arising from separate decisions on points of law, are never intended to be interpreted retrospectively so as to prevent the danger of uncertainty or disturb the basis on which contracts and fiscal arrangements had been entered into*. Perhaps the only exception can be found in situations like that experienced by Abdul Rahim when he was convicted for trafficking at a time when the rule against double presumptions had not been decided to be oppressive, but following his appeal to the Court of Appeal, the rule had worked towards his advantage. *As such, retrospectivity can only operate in pending cases but not where cases have been decided to their finality*. (emphasis added)

and Pajan Singh Gill FCJ also held as follows:

> Finally, on the question of retrospectivity I concur with the views expressed by my learned brother Dato' Abdul Malek Ahmad (PCA), and my learned sister Dato' Siti Norma Yaakob (FCJ) in their respective draft judgments.

[35] In the circumstances, I have carefully read both the *Mohd Radzi* and *Tan Tatt Eek* cases. When they are broadly interpreted, I can surmise that the decision on retrospectivity (including limitation thereto to cases which have not been finally determined) are findings made on the fact in issue; hence *ratio decidendi*.

[36] However, when they are narrowly interpreted, I can equally surmise that since the facts of both cases concerned an appeal which was still pending and not finally determined yet; hence any further comment on the effect of retrospectivity on other cases which are already finally determined is *obiter*. This is because it is immaterial and unnecessary to the fact directly in issue.

[37] That notwithstanding, this narrow interpretation may be rebutted in that the aforementioned further comment is really in substance the flipside of the *ratio decidendi* without anything extra added in *obiter*.

[38] These are indeed very fine distinctions in the difficult endeavour to search for what is exactly the *ratio decidendi* in the *Mohd Radzi* and *Tan Tatt Eek* cases.

[39] In the Federal Court case of *Munawar Ahmad Anees v. PP* [2010] 1 CLJ 802, Raus Sharif FCJ (later CJ) held as follows:

> [16] In the present case, it is not in dispute that the applicant's case originated from the Sessions Court. The matter came before the High Court in its appellate capacity and not under its original jurisdiction. Section 87 of the Courts of Judicature Act 1964 provides that the Federal Court shall have jurisdiction to hear and determine any appeal from the decision of the Court of Appeal in its appellate jurisdiction in respect of any matter decided in the High Court in its original jurisdiction. In a criminal matter which originated from the Sessions Court, as in this case, the Court of Appeal stands as the apex court. No further appeal shall lie to the Federal Court. The appeal should stop at the Court of Appeal. That was what exactly decided by this court on 17 December 2008. This court had ruled that it could not deal with the matter for want of jurisdiction. Surely, after declining jurisdiction, this court cannot now assume jurisdiction. The matter has come to an end. It has to stop otherwise there will be no end to a litigation.
>
> [17] In addition, we are of the view that what was said by this court in paras 20 to 26 of the impugned judgment were not something that this court plucked from thin air. *From the impugned judgment itself, it is clear that what was said by this court in paras 20 to 26 was in relation to something which was argued by the parties. Submissions on the merits of the case were made by the parties. Hence, there is nothing wrong for this court to express its view or opinion on the matters submitted before the court. Whether what was said by this court in paras 20 to 26 is obiter dicta or a ruling, it is not for this court to determine through an application of this nature. As rightly pointed out by the learned Deputy Public Prosecutor, there should not be a declaratory order to pinpoint which part of a judgment is obiter or a ruling. Such determination has to be done by the skills of counsel appearing before the courts. It cannot be done by way of an application as it is being done in this case.* (emphasis added)

[40] Consequently, I further discern that it seems necessary to also examine into the submissions of counsel of the case to discern whether the finding made by the court is *ratio decidendi* or *obiter dicta*. I have accordingly reviewed both the *Mohd Radzi* and *Tan Tatt Eek* cases but am unable to discover how counsel exactly submitted on the fact in issue therein.

[41] Be that as it may, I am also not convinced that the opinion of Justice Abdul Malek Ahmad has been made *en passant* or in the passing contrary to that as submitted by Dato' Vendargon. It was concurred by Chief Justice Ahmad Fairuz in the *Mohd Radzi* case. Furthermore, the same opinion was concurred by Justices Siti Norma and Pajan Singh Gill in the *Tan Tatt Eek* case. There must have been deliberations done. I therefore believe that the

apex court consciously introduced the limitation to develop the Malaysian jurisprudence on retrospectivity differently from the English jurisprudence as adopted in *PP v. Dato' Yap Peng* [1987] 1 CLJ 550; [1987] CLJ (Rep) 284; [1987] 2 MLJ 311.

[42] In the premises, I am not so bold and confident to hold that the opinion of Justice Abdul Malek Ahmad is *obiter* because it is definitely not plainly and obviously so. Nonetheless based on *stare decisis*, I am also bound by the Court of Appeal case of *Hamzah Mat Sah v. Ambank (M) Berhad* (*supra*) which has faithfully followed and applied Justice Abdul Malek Ahmad's opinion; see *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645 on the principles of *stare decisis*.

[43] Accordingly, there is no cogent reason for me not to follow my earlier decision of *Kasugi Prima Sdn Bhd v. Cobrain Holdings Sdn Bhd (and Another Originating Summons)* (*supra*) which followed *Hamzah Mat Sah v. Ambank (M) Berhad* (*supra*) as relied upon by the defendant.

[44] Based on the facts of the case herein as narrated in paras. [8] and [9] above, the defendant's enforcement applications of the adjudication decisions were allowed by the court without further appeal by the plaintiff. In fact, the plaintiff thereafter paid the defendant accordingly based on the adjudication decisions. There is, in other words, no pending court challenge in respect of the adjudication decisions. Consequently, the retrospectivity effect of the cases of *Jack-In-Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (*supra*) and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* (*supra*) neither applied nor affect the adjudication decisions here.

[45] The application is thus on final analysis unmeritorious.

Conclusion

[46] For the foregoing reasons, the application is disallowed with costs of RM20,000 subject to 4% allocator.